[Cite as *Novak v. State Farm Ins. Cos.*, 2009-Ohio-6952.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

MARTHA NOVAK Appellant v. STATE FARM INSURANCE COMPANIES Appellees	C. A. No. 09CA0029-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 07-CIV-1007

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

CARR, Presiding Judge.

{¶1} Appellant, Martha Novak, appeals the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} The parties stipulated to the following facts. Martha Novak owned Unit 310 in the Great Oaks Condominiums complex located on Deepwood Drive in Wadsworth, Ohio. Novak was a member of the Great Oaks Condominiums Association ("Association"). Ronald Ford and Gina Fredrick, formally known as Gina Ford ("the Fords"), owned Unit 308 on Deepwood Drive which was adjacent to the unit owned by Novak. The unit owned by Novak shared a common wall with the unit owned by the Fords. In 2000, the Fords abandoned their unit. In late 2000, the heat to their unit was shut off and as a result of freezing, a water pipe located inside the unit burst. There was flooding in the Ford unit that saturated the common wall with the Novak unit.

{¶3} The Association carried a condominium association policy with State Farm Insurance Co. ("State Farm"). In 2001, State Farm became aware of the allegations of mold growth on the common wall in the Novak unit. When Novak filed her original lawsuit against the Fords and the Association in 2005, the Association tendered the defense of the claim to State Farm. State Farm provided a defense for the Association. The Fords never submitted any type of claim to State Farm as they did not have their own policy through State Farm.

{¶4} The Great Oaks Condominium Unit Owners Association State Farm Policy provides:

"SECTION II

"WHO IS AN INSURED

"***

"2. Each of the following is also an insured:

"***

> "e. each individual unit-owner of the insured condominium, but only for liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that unit-owner's exclusive use or occupancy."

{¶5} With regard to general coverage, the Great Oaks Condominium Unit Owners Association State Farm policy provides:

"SECTION II

"GENERAL CONDITIONS

"***

"3. Duties in the Event of Occurrence, Claim or Suit.

"***

"c. You and any other involved insured must:

(1) immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;

(2) authorize us to obtain records and other information;

(3)cooperate with us in the investigation, settlement or defense of the claim or suit; and

(4) assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

d. Except at their own cost, no insureds will voluntarily make a payment, assume any obligation or incur any expense, other than for first aid, without (State Farm's) consent.

"4. Legal Action Against Us. No person or organization has a right under this policy:

"a. to join us as a party or otherwise bring us into a suit asking for damages from an insured; or

"b. to sue us on this policy unless all of this policy's terms have been fully complied with."

{¶6} After the original lawsuit was dismissed and subsequently re-filed, State Farm was also named as a defendant in the case for a period of time. On May 4, 2007, the Fords consented to a judgment of $100,000 and, in turn, Novak agreed not to execute on that judgment against the Fords individually. The settlement was confirmed on the record. State Farm was not

present at the settlement proceeding when the Fords entered into the agreed on judgment. State Farm did not learn of the May 4, 2007 settlement until after the fact.

{¶7} On May 21, 2007, the trial court entered judgment in favor of Martha Novak and against each of the Fords in the amount of $50,000 for a total of $100,000. Thereafter, on June 27, 2007, Novak filed a supplemental complaint pursuant to R.C. 3929.06 against State Farm. Both State Farm and Novak filed motions for summary judgment which were overruled on the basis that there were questions of material fact. On March 11, 2009, both parties filed amended stipulations to the facts and renewed their motions for summary judgment. On April 9, 2009, the trial court entered judgment for State Farm. Martha Novak filed her notice of appeal on May 4, 2009.

{¶8} On appeal, Novak raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN OVERRULING THE MOTION FOR SUMMARY JUDGMENT OF MARTHA NOVAK AND IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF STATE FARM."

{¶9} Novak argues that trial court erred in denying her motion for summary judgment and granting State Farm's motion for summary judgment. This Court disagrees.

{¶10} We review an award of summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

> "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶11} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher*, 75 Ohio St.3d at 293.

{¶12} In this case, both Novak and State Farm filed motions for summary judgment. The motions presented two legal issues. The first was whether the Fords were insured under the policy issued by State Farm to the Association. The second was whether, by agreeing to a consent judgment issued in favor of Novak, the Fords prejudiced State Farm to the extent that even if the Fords were insured under the policy, their breach would have relieved State Farm of any liability. Because the trial court resolved the second issue in the affirmative, the trial court did not analyze the first issue. Specifically, the trial court concluded that the confession of judgment by the Fords prejudiced State Farm and Novak failed to meet its burden to show that there was no prejudice.

{¶13} In reaching its decision to grant State Farm's motion and deny Novak's motion, the trial court relied on *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, paragraph two of the syllabus, which states:

> "When an insurer's denial of underinsured motorist coverage is premised on the insured's breach of a consent-to-settle or other subrogation-related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured's breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary."

This Court has held that where an insurer does not refuse to defend an insured, the insured is not at liberty, and is in fact barred from, entering into a settlement agreement without the insurer's consent. *Auto-Owners Ins. Co. v. J.C.K.C., Inc.*, 9th Dist. No. 21847, 2004-Ohio-5186, at ¶19.

{¶14} Novak contends that State Farm had actual notice of the lawsuit because of its familiarity with the claim that had been filed by the Association. It follows, Novak argues, that State Farm had an obligation to provide a defense for the Fords per the insurance agreement. In support of her position, Novak points to the Supreme Court of Ohio's decision in *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582. In *Sanderson*, the Supreme Court held that "[b]y unjustifiably refusing to defend an action, the insurer voluntarily forgoes the right to control the litigation and the insured may make a reasonable settlement without prejudice to the insured's rights under the insurance policy." *Sanderson*, 69 Ohio St.3d at paragraph two of syllabus.

{¶15} This Court is not persuaded by Novak's argument. Novak acknowledged in her filings with the Court that a key distinction between the facts of this case and the facts at issue in *Sanderson* is that here, unlike in *Sanderson*, the insurer never actually refused to defend the Fords because the Fords never requested coverage from State Farm. Under the terms of the insurance agreement, the Fords were not at liberty to settle the lawsuit on their own without the permission of State Farm. In addition to not filing a claim with State Farm, the Fords did not take any steps to include State Farm in settlement negotiations, nor did they notify State Farm of the possibility of a settlement. Therefore, by consenting to the judgment, the Fords breached the terms of the insurance agreement and relieved State Farm of any obligation to perform that might have existed.

{¶16} On appeal, Novak maintains that the reason the Fords did not file a claim with State Farm is that they were not aware that they were insured during the course of the trial court litigation. Even if the Fords were unaware of the terms of the insurance agreement at the outset of the litigation, they undoubtedly would have become aware of their relationship with State Farm when they confronted the terms of the settlement. In its judgment entry, the trial court

noted that "[State Farm] was the only entity that could be affected by this judgment since [Novak] agreed not to proceed with any execution on the judgment against the Fords." The parties are bound by the terms of the insurance agreement. The agreement stated that the Fords were required to send State Farm copies of any demands, notices, summonses or legal papers received in connection with the suit, authorize State Farm to obtain records and other information, and cooperate with State Farm's investigation, settlement or defense of the suit. It follows that any obligation State Farm may have had to perform under the insurance agreement was relieved when the Fords breached the insurance agreement by settling the case without State Farm's consent.

{¶17} Novak's sole assignment of error is overruled.

III.

{¶18} Novak's sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶19} I respectfully dissent. I would reverse the trial court's determination that the Fords breached the terms of the insurance policy. As early as 2001, State Farm was aware of the allegations of mold growth in the Novak unit. State Farm also had actual notice of the two lawsuits. The policy does not place an additional burden upon the insureds to formally request that State Farm take action to defend once State Farm has received notice of the potential claim or suit. Rather, the policy only requires that State Farm be notified of the claim. That is exactly what happened. *Harless v. Sprague*, 9th Dist. No. 23546, 2007-Ohio-3236, at ¶28 (notice is sufficient where insurer received courtesy copy of complaint from plaintiff's counsel); *Costa v. Cox* (1958), 84 Ohio Law Abs. 338, 343, affirmed 168 Ohio St. 379 (after casualty insurance company was "seasonably notified of the accident by the attorney of the injured person," and insurer conducted only a "casual investigation" and took no action to defend once suit was filed, "such conduct on the part of the company constituted a waiver of a strict compliance with the notice provisions in the policy[]").

{¶20} Notwithstanding its actual notice of the lawsuit, State Farm then sat back and did not take any action to investigate the potential claim against the Fords. The Supreme Court of

Ohio held in *Sanderson v. Ohio Edison Co.,* 69 Ohio St.3d 582, 586, as follows:

> "[W]here an insurer unjustifiably refuses to defend an action, leaving the insureds to fend for themselves, the insureds are at liberty to make a reasonable settlement without prejudice to their rights under the contract. By abandoning the insureds to their own devices in resolving the suit, the insurer voluntarily forgoes the right to control the litigation and, consequently, will not be heard to complain concerning the resolution of the action in the absence of a showing of fraud, even if liability is conceded by the insureds as a part of settlement negotiations."

In my view, State Farm's conduct constituted an unjustified refusal to defend. Despite notice of the claim, State Farm left the Fords to fend for themselves during the lawsuit. *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 180 (even "where insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept defense of the claim[]"). Hence, State Farm cannot now claim that the Fords breached the terms of the insurance policy. See, also, *Costa*, 84 Ohio Law Abs. at 344 (before a contractual right from the insured can be demanded, the company must fulfill its contractual obligations to defend a suit from its insured). Accordingly, I would reverse the trial court's judgment that the Fords breached the terms of the policy, and I would remand the matter to the trial court for further consideration as to whether the Fords were insureds pursuant to the terms of the condominium association policy.

APPEARANCES:

JAMES J. GUTBROD, Attorney at Law, for Appellant.

GREGORY H. COLLINS, Attorney at Law, for Appellee.